ZAKARIA DAUD

v.

SITI HUSSIN & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: D-02-310-2002]
24 JUNE 2003

LAND LAW: *Transfer - Rectification - Common mistake - Burden and standard of proof - Allegation by plaintiff that wrong plot of land was transferred to him - Rectification of land title sought - Whether plaintiff bears burden of proving common mistake*

CONTRACT: *Mistake - Common mistake - Burden and standard of proof - Allegation by plaintiff that wrong plot of land was transferred to him - Rectification of land title sought - Whether plaintiff bears burden of proving common mistake*

This was an appeal from the decision of the High Court dismissing the plaintiff's action to rectify the document of title in respect of two lots of land. It was contended that a common mistake had resulted in the wrong plot of land being transferred by the defendants to the plaintiff and that, as such, rectification of the register would be necessary to reflect the true intention of the parties. The plaintiff argued that the trial judge had misdirected himself on the evidence and misconstrued the facts. It was also contended that the trial judge had erred in placing the burden of proof in respect of mistake upon the plaintiff instead of the defendants.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court

[1] The evidence adduced in support of the proof of a common mistake should be irrefragable. It should be cogent and must meet a very high standard of proof. "The burden of proof is on the party seeking rectification. He must produce 'convincing proof' not only that the document to be rectified was not in accordance with the parties' true intentions at the time of its execution, but also that the document in its proposed form does accord with their intentions." (pp 846 g-h, 847 a, e-h & 848 a)

[Orders of High Court affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini merupa satu rayuan dari keputusan Mahkamah Tinggi yang menolak tindakan plantif untuk membetul dokumen hakmilik yang berhubung dengan dua lot tanah. Adalah ditegaskan bahawa terdapat satu kesilapan lazim pada dokumen tersebut yang telah menyebabkan plot tanah yang berlainan dipindahmilik daripada defendan-defendan kepada plaintif dan bahawasanya, pembetulan pada daftar adalah perlu bagi mencerminkan niat sebenar kedua-dua pihak. Plaintif mengatakan bahawa hakim bicara telah tersalah arah dirinya mengenai keterangan dan telah tersilap dalam menafsir fakta-fakta. Ianya juga ditegaskan bahawa hakim bicara telah tersilap dalam meletakkan beban membukti berhubung dengan kesilapan ke atas plaintif dan bukannya defendan-defendan.

Diputuskan (menolak rayuan) :
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah

[1] Keterangan yang dikemukakan bagi menyokong bukti kesilapan lazimnya mesti yang tidak boleh dipatahkan. Ianya sepatutnya menyakinkan dan mesti memenuhi darjah bukti yang tinggi. Beban membukti adalah pada pihak yang memohon pembetulan. Beliau hendaklah mengemukakan bukti yang menyakinkan, yang bahawa, bukan sahaja dokumen yang perlu dibetulkan itu tidak mematuhi niat sebenar pihak-pihak pada masa perlaksanaannya, tetapi dokumen tersebut juga dalam bentuk sekarang ini tidak memenuhi niat mereka.

Perintah Mahkamah Tinggi disahkan.]

Case(s) referred to:
Shelburne v. Inchiquin [1784] 1 Bro CC 338 ***(foll)***

Other source(s) referred to:
Chitty on Contracts, 27th edn, vol 1, para 5-045

For the appellant - Wan Mustapha Hj Ali; M/s Wan Mustapha & Co
For the respondent - C Jegathesan (Nasrul Mohamed & Asmah Azhari); M/s C Jegathesan

[Appeal from High Court, Kota Bharu; Civil Suit No: 137/82]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the Court.

This case has a very long history. The essence of the dispute between the parties started 70 years ago. It concerned the identity of a piece of land.

At the material time there were two lots of lands. We will call them Lot 196 and Lot 639 for convenience. Lot 196 was owned by three sisters who were predecessors of title in the instant respondents. The other piece of land, namely lot 639 was owned by five persons three of whom were the sisters we spoke of a moment ago.

In 1932, a transfer was made. It was registered in the appellant's favour. The particulars of the registration reveal that Lot 196 was the subject matter of the transfer. Very much later the appellant asserted that the parties to the transfer did not intend that Lot 196 should be the subject matter of the transfer. He contended that the parties intended to transfer Lot 639 to him. His case is that it was pursuant to that mistake that he remained in possession in lot 639 for all these years.

The appellant's action for rectification of the register was heard by the High Court at Kota Bharu. Witnesses were called and were subjected to searching cross-examination. After hearing the arguments at the conclusion of the trial the trial judge dismissed the appellant's claim. The appellant now appeals to us.

At the forefront of the argument of learned counsel for the appellant is the point that the learned judge misdirected himself on the evidence and misconstrued the facts. Learned counsel for the appellant Datuk Wan Mustapha, argued that the learned judge fell into error by placing the burden upon his client when it ought to have been reversed onto the respondent.

Now, the principles governing a case such as the present are very well settled. They were settled as long ago as the 18th century. In *Shelburne v. Inchiquin* [1784] 1 Bro. CC 338, Lord Thurlow held that the evidence in support of the proof of common mistake should be irrefragable. In other words it should be cogent and must meet a very high standard of proof. The rationale behind this requirement is not difficult to discern. The transaction entered into between the parties and by the documents executed between them voluntarily and for good

and valuable consideration are not to be set aside by the court wily nily for the slightest reason. Were it so, the law would be riddled with uncertainty and commerce will come to a stand still.

In the present case the learned judge undertook a very careful and searching analysis laid before him. He summed up the appellant's case as follows:

> It was alleged by the plaintiff that the transfer of the said portion was effected at the Land Office Bachok but 'for unknown reason or mistake Lot 196 in same area instead was transmitted and registered to plaintiff.
>
> Pursuant to the said purchase, the Plaintiff claimed that his father went into occupation of the said land since 1932 to this very day and had planted coconut trees and had also erected a house thereon. Consequent upon the said mistake or errorneous registration, it was further alleged that the three defendants referred to above had 'unlawfully acquired Lot 639 when they knew or ought to know that plaintiff owned 237/350 shares in Lot 639 and had since gone into occupation of the said land.'

The learned judge then went on to deal with the law of mistake. He referred to the following paragraph in 27th edn, vol. 1 on *Chitty on Contracts* para 5-045 (p. 43-44 of Rekod Rayuan):

> The burden of proof is on the party seeking rectification. He must produce 'convincing proof' not only that the document to be rectified was not in accordance with the parties' true intentions at the time of its execution, but also that the document in its proposed form does accord with their intentions. It is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the contract. The denial of one of the parties that the deed as it stands is contrary to his intention ought to have considerable weight, and unless the other party can convince the court that the document does not represent both parties' intentions at the time of execution, rectification will only exceptionally be ordered. Indeed, it has been said that it is not sufficient that the written contract does not represent the true intention of the parties; it must be shown that the written contract was actually contrary to the intention of the parties.
>
> Where it is sought to rectify a document in accordance with a prior agreement between the parties, it must be shown that the intention of the parties continued unaltered up to the time of the execution of the document.

We find no misdirection whatsoever by the learned judge in the paragraphs in his judgment we have quoted or in the application of the principle relevant to the present appeal. Further, we find no error whatsoever in the learned judge's direction as to the burden of proof, both as to its nature and its incidence. This is what he said on the subject (p. 53 of Rekod Rayuan, line 8 from below):

> In fact I had not been unmindful of the burden placed on the plaintiff to establish its case – a very much lighter burden in comparison to a criminal trial as required of the prosecution; but even then in a criminal trial the prosecution was not required to prove its case to the hilt.

We would add for good measure that if there was any misdirection at all on the standard of proof then such misdirection favoured the appellant.

For the reasons we have given we find no merit whatsoever in this appeal. The arguments of the learned counsel for the appellant although engaging, are, with much respect to him, unconvincing. In the result, the appeal fails. It is dismissed with costs. The orders of the High Court are affirmed. The deposit paid in court shall be paid out to the respondent to account of taxed costs.